IN THE COURT OF APPEALS OF THE STATE OF ALASKA

VONGDEUANE VONGTHONGDY,	)	
	)	Court of Appeals No. A-10951
Appellant,	)	Trial Court No. 3AN-08-13448 CR
	)	
v.	)	
	)	MEMORANDUM OPINION
STATE OF ALASKA,	)	
	)	AND JUDGMENT
Appellee.	)	
	)	No. 5973 — September 18, 2013

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack Smith, Judge.

Appearances: Dan S. Bair, Assistant Public Advocate, Appeals & Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. W. H. Hawley, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Smith, Superior Court Judge.[*]

Judge ALLARD.

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[*] Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution and Administrative Rule 24(d).

A jury convicted Vongdeuane Vongthongdy of first-degree murder, second-degree murder, third-degree misconduct involving weapons, and fourth-degree misconduct involving weapons. Vongthongdy appeals, arguing that the evidence at trial was insufficient to convict him of first-degree murder. Vongthongdy also argues that the sentencing court erred in failing to strike a section entitled "Gang Affiliation" from his presentence report.

For the reasons set out below, we affirm Vongthongdy's conviction for first-degree murder, but we remand the case to the sentencing court to strike the disputed portion of the presentence report and issue a corrected report under Alaska Criminal Rule 32.1(f).

Factual Background and Prior Proceedings

In the early morning hours of November 30, 2008, Vongdeuane Vongthongdy and two friends left the Woodshed, an Anchorage bar, and spoke with one or more people in a silver Mercedes on the corner of Third Avenue and F Street. At the conclusion of the conversation, Vongthongdy took out a handgun and fired a shot into the air. As the Mercedes sped off, Vongthongdy and his companions began to walk away.

Evan Minnear was waiting outside the Woodshed with his girlfriend and her friend for a cab when they heard the gunshot. Minnear started walking toward Vongthongdy and his two companions and yelled at them to stop. When Minnear reached the men, approximately ten seconds of yelling and pushing ensued. The ground was slick with snow. Minnear fell to the ground either when he pushed one of the men or when one of the men pushed him. As Minnear tried to get back up, Vongthongdy took out his gun. One of Vongthongdy's companions told him to stop. Vongthongdy

shot Minnear as he was standing up, aiming the gun at a downward angle. The bullet entered Minnear's torso, about six inches below his nipples and slightly left of center, and exited above Minnear's buttock, right of center.

Immediately after the shot was fired, Vongthongdy and his companions ran down Third Avenue, got into a vehicle, and drove off. They were pulled over shortly after the shooting, and witnesses identified Vongthongdy as the shooter. Minnear was transported to the hospital, where he died of his injuries.

Vongthongdy was charged by indictment with one count of first-degree murder, one count of second-degree murder, and one count of third-degree misconduct involving weapons; he was charged by information with one count of fourth-degree misconduct involving weapons. Vongthongdy was convicted by jury of first-degree murder, second-degree murder, and fourth-degree misconduct involving weapons, and he entered a no contest plea to third-degree misconduct involving weapons. Vongthongdy was sentenced to a combined total of 80 years to serve.

Why we find there was legally sufficient evidence Vongthongdy was guilty of first-degree murder

Vongthongdy does not dispute that he shot Minnear as Minnear was standing up, but Vongthongdy argues that there was insufficient evidence that he intended to kill Minnear when he shot him. Specifically, Vongthongdy argues that because he shot Minnear in a "lower" body area, rather than in the head or upper torso, this was "strong evidence" he did not intend to kill Minnear.

To be guilty of first-degree murder, a person must act "with intent to cause the death of another person."[1] In a homicide case, intent "may be inferred from the

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[1] AS 11.41.100(a)(1).

circumstances attending the killing."[2] Generally, a jury can infer that a defendant intended to produce the results that were the natural and probable consequences of the defendant's voluntary acts.[3] Applying this presumption to homicide cases, a jury may infer an intent to kill from the use of a deadly weapon (absent explanation or mitigation).[4]

It is undisputed that Vongthongdy used a deadly weapon to shoot Minnear in his torso.[5] Vongthongdy attempts to explain on appeal that he shot Minnear with intent "only to impede Minnear from getting up." But the jury was entitled to infer from Vongthongdy's use of a deadly weapon that he intended to kill Minnear.[6] Viewing this evidence in the light most favorable to the verdict, we find that there was sufficient evidence for a fair- minded juror to conclude that Vongthongdy was guilty of first-degree murder beyond a reasonable doubt.[7]

Why we conclude that the superior court erred in failing to strike the "gang affiliation" section from the presentence report

Vongthongdy's presentence report contains a section entitled "Gang Affiliation," in which the presentence report writer referred to Detective Lofthouse's

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[2] *Howell v. State*, 917 P.2d 1202, 1212 (Alaska App. 1996) (quotation omitted).

[3] *Adams v. State*, 598 P.2d 503, 509 (Alaska 1979).

[4] *Gray v. State*, 463 P.2d 897, 903 (Alaska 1970). *See also* 2 Wayne R. LaFave, Substantive Criminal Law § 14.2(b)(2d ed. 2012) ("one who intentionally uses a deadly weapon on another human being and thereby kills him presumably intends to kill him.").

[5] *See* AS 11.81.900(b)(17).

[6] *Gray*, 463 P.2d at 903.

[7] *Howell*, 917 P.2d at 1212.

opinion that Vongthongdy was a criminal street gang member. The section summarized the factual allegations that Lofthouse relied on in forming this opinion: (1) that Vongthongdy's brother was a known gang member; (2) that Vongthongdy was the victim of a drive-by shooting, had possessed controlled substances, and was involved in assaults with weapons; (3) that Vongthongdy has two gang-related tattoos — "Crip" on his knuckles and "LOS" (Laos Oriental Soldiers) on his arm; and (4) that Vongthongdy had possessed or displayed gang-related colors (a blue bandana).

Vongthongdy objected to this portion of the presentence report and requested that it be struck as untrue and unproven. Vongthongdy argued that the factors Lofthouse relied on were insufficient to support his conclusion that Vongthongdy was a member of a criminal street gang. Vongthongdy also argued that some of the factual allegations Lofthouse relied on were inaccurate. For example, Vongthongdy claimed that the allegation that he had possessed "gang colors" was based on the police finding a single blue bandana in a group of 10 or more people. Likewise, Vongthongdy argued that there was no evidence that he had been involved in any assaults with weapons other than the present case, and no evidence that he was involved in any gang-related drug activity.

In response, the prosecutor did not argue that the factual assertions were accurate or that the allegation of gang affiliation was necessarily true. Instead, he argued that Detective Lofthouse was an experienced police officer who was qualified to make these types of determinations and that his opinion that Vongthongdy was a member of a criminal street gang should remain in the presentence report as "opinion evidence." The prosecutor explained that he did not intend to rely on the alleged gang affiliation in his sentencing remarks and that he was not asking the trial court to make any findings about whether Vongthongdy actually was a member of a criminal street gang or whether this was a gang-related crime. He argued, however, that the opinion should remain in

the presentence report and that it was "no different than a defense attorney presenting a letter from the defendant's pastor who said ... that this defendant is a member of my parish and he's an introspective man with insight and a spiritual side."

The superior court found that there was "no evidence that this was a gang-related shooting in any manner." The court further stated that the detective's opinion about Vongthongdy's alleged gang affiliation would have no impact on sentencing and would be given "absolutely no weight." The court nevertheless refused to strike this section from the presentence report, accepting the prosecutor's arguments that the State was entitled to include this "opinion evidence" in the presentence report.

We agree with Vongthongdy that this was error. As we held in *Cragg v. State*, a sentencing judge's duty to strike controverted allegations from the presentence report extends not only to "'[a]llegations that the judge finds are not established' but also to allegations 'that the judge determine[s] will not be considered'."[8] Once the sentencing judge declared that he would not consider the disputed allegation at sentencing, the judge was required to remove that section from the presentence report.[9]

On appeal, the State argues that Vongthongdy failed to properly challenge the allegation of gang affiliation, and that it therefore should remain in the presentence report as sufficiently proven. But this was not the way the issue was litigated below. The prosecutor never argued that Vongthongdy failed to put the allegation into actual dispute, nor did he request findings from the trial court regarding whether the allegation was sufficiently proven. Instead, he argued that the alleged gang affiliation should be

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[8] 957 P.2d 1365, 1367-68 (Alaska App. 1998) (quoting former Criminal Rule 32.2(a)(3), now incorporated into Criminal Rule 32.1(f)(5)).

[9] *See also* Alaska Criminal Rule 32.1(f)(5) ("If the court determines that the disputed assertion is not relevant to its sentencing decision so that resolution of the dispute is not warranted, the court shall delete the assertion from the report without making any findings.").

included in the presentence report as relevant "opinion evidence." This argument was without merit and should have been rejected by the sentencing court.

Conclusion

For the reasons set forth in this opinion, we AFFIRM Vongthongdy's conviction of first-degree murder but REMAND the case to the superior court to strike the gang affiliation section of the presentence report and issue a corrected version pursuant to Alaska Criminal Rule 32.1(f).